



Episode 23: How the CL-100 Contingency works

Call from the Agent: If the Wood Infestation Report paragraph says “contingent,” what does it actually mean?

The Response: Paragraph 11 (titled Wood Infestation Report) of the current version of the standard SCAR residential contract (Form 310) provides, as follows:

11. WOOD INFESTATION REPORT: If the Property to be sold has been previously occupied, this Contract is contingent not contingent upon the Buyer Seller having the Property inspected at their expense by a qualified/licensed/bonded pest control operator selected by the Buyer Seller. Buyer Seller shall deliver timely Notice of and shall deliver to Closing a CL100 Wood Infestation Report dated no earlier than 30 calendar days prior to Closing and no later than _____ calendar days prior to Closing. If the Buyer is responsible for having the Property inspected as indicated above, but does not have the Property timely inspected for the report's required Delivery time frame, the Buyer waives any and all rights under the terms of this section. The Seller makes no warranties with regard to matters covered by such infestation report or any other improvement unless specifically stated in this Contract.

If the wood infestation report reveals the presence or indication of or damages by termite infestation or other wood destroying organisms, Seller shall remedy such deficiencies and shall furnish the Buyer with a CL100 wood infestation report by a qualified/licensed/bonded pest control operator (dated no earlier than 30 calendar days prior to Closing) that the Property is free from infestation or any damage herein mentioned; or documentation that the infestation has been treated and damage has been repaired as appropriate in a workmanlike manner on or before closing and reported by an appropriate licensee. State law and regulations control CL100 issues. If the Seller does not make the repairs and treatment, the Buyer shall have the option to (1) accept the Property in its present condition, (2) negotiate with the Seller for the payment of these repairs and treatment, or (3) terminate this Contract by Delivering Notice of Termination to the Seller. If the Property to be sold has not been previously occupied, Seller shall certify that the Dwelling has been treated by soil poisoning for the prevention of termites and other wood destroying organisms and shall provide at Closing to the Buyer a written certification from a qualified/licensed/bonded pest control operator. The obligations of the Seller under this Section terminate after the Closing.

Note the highlighted words. The contingency is simply that the property *be inspected* (i.e. that a CL-100 be done) – period. Many seem to believe “contingent” means, if the buyer isn’t satisfied with the CL-100, he can immediately terminate the contract -- that is not so (unless Due Diligence has not yet expired). In reality, if a CL-100 reveals damage and/or infestation, the second para within para 11 requires the seller repair the damage and/or treat the infestation – this is true regardless of whether “contingent” or “not contingent” is selected. If the seller repairs/treats, the buyer remains obligated to complete the purchase. If the seller does not repair/treat, the buyer may 1) buy the property anyway; 2) negotiate for payment of repairs and/or treat; or 3) terminate the contract. Expressed more plainly, the buyer has the right to terminate *only if the seller refuses to make repairs and/or treat the infestation*.

The following questions and answers help to illuminate the point:

Q. If “contingent” is selected, what does it mean?

A. If it is contingent on the seller having a CL-100 done and the seller does not do so, the buyer can terminate (and does not have to pay a termination fee) – this is a true contingency. If it is contingent on the buyer having a CL-100 done, the sentence is almost completely meaningless – this is an unintended drafting error by SCAR.

Q. If “not contingent” is selected, what does it mean?

A. This is usually selected if the parties do not wish to require a CL-100. Nevertheless, if a CL-100 is done, the seller is obligated to repair/treat pursuant to the second para of para 11.

Q. If a “bad” CL-100 is received during Due Diligence, can the buyer immediately terminate and does he have to pay a termination fee?

A. The buyer can immediately terminate, but must pay the termination fee.

Q. If a “bad” CL-100 comes back after Due Diligence, is the seller still obligated to repair/treat?

A. Yes.

Q. If a “bad” CL-100 comes back after Due Diligence and the seller does not repair/treat and the buyer wants to terminate, does the buyer have to pay a termination fee?

A. No, the seller’s failure to repair/treat is a breach of contract. Therefore, no termination fee is due regardless of whether the termination is within or beyond the Due Diligence period.

Q. In preparing the contract, if the parties do not want the seller to be required to repair/treat even if a “bad” CL100 is received, what should be done in para 11?

A. You would select “not contingent” in the first para of para 11 and *the second para of para 11 should be stricken*.

NOTE: The time limits contained in paragraph 11 are plain and, for that reason, are not discussed here.